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In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. _____.

ROBERT McCLELLAN,

Plaintiff-Appellant,

v.

CHESAPEAKE & OHIO RAILWAY COMPANY,

Defendant-Appellee.

APPEAL FROM THE COURT OF APPEALS FOR THE EIGHTH JUDICIAL DISTRICT OF OHIO, CUYAHOGA COUNTY.

STATEMENT AS TO JURISDICTION.

Pursuant to Rules 13(2) and 15 of this Court, appellant files this statement of the bases upon which the Supreme Court of the United States has jurisdiction on appeal to review the final judgment below dismissing plaintiff's action, and the reasons why this Court should exercise such jurisdiction in this case.

OPINIONS BELOW.

The Court of Common Pleas for Cuyahoga County and the Court of Appeals for the Eighth Judicial District of Ohio did not deliver written opinions, but the grounds for their rulings are set forth in their respective journal entries which are reproduced in the appendix to this Jurisdictional Statement at p. 12.

JURISDICTION.

This appeal is taken from a final judgment made by the Court of Appeals for the Eighth Judicial District of Ohio which affirms the order of the Common Pleas Court for Cuyahoga County quashing service upon the defendant. That final order from which this appeal is taken was made and entered on June 1, 1964. Thereafter, the Supreme Court of Ohio exercised its discretionary authority by dismissing an appeal to that court and denying a Motion to Certify the Record on October 21, 1964. Notice of Appeal was filed in the Court of Appeals for the Eighth Judicial District on January 15, 1965. The jurisdiction of this Court is invoked under 28 U. S. C. 1257(2).

QUESTIONS PRESENTED.

1. Whether the Ohio Railway Venue Statute (Ohio Revised Code Section 2307.37) violates the Privileges and Immunities Clauses of Article IV, Section 2 and the Fourteenth Amendment of the United States Constitution by discrimination against a citizen of West Virginia.

2. Whether the Ohio Railway Venue Statute violates the provisions of the Equal Protection Guarantee of the Fourteenth Amendment of the United States Constitution by unreasonable classification and discrimination with respect to claimants against railroads as distinguished from all other claimants.

3. Whether the Ohio Railway Venue Statute violates the Equal Protection Guarantee of the Fourteenth Amendment of the United States Constitution by unreasonable classification and discrimination against persons not resident in Ohio on an arbitrary date.

4. Whether the Ohio Railway Venue Statute violates the Supremacy Clause of Article VI of the United States Constitution by discriminating against claimants seeking to enforce the Federal Employers Liability Act.

STATUTE INVOLVED.

Ohio Revised Code Section 2307.37 provides as follows:

> "An action against the owner or lessee of a line of mail stages or other coaches, a railroad company, inter-urban railway company, suburban railroad company, or street railway company owning or operating a railroad, inter-urban railway, or street railway within the state may be brough in any county through or into which such line, railroad, inter-urban railway, or street railway passes or extends. *All actions against such owner, lessee, or company for injuries to persons or property or for wrongful death must be brought in the county in which the cause of action or some part thereof arose, or in the county in which the claimant for injuries to person or property or one whose wrongful death was caused resided at the time when the cause of action arose,* if the road or line of such owner, lessee, or company or any part thereof is located in such county. If no part of such line or road is located in such county, then such actions may be brought in the county in which any part of such road or line is located, nearest the place where the claimant for injuries to person or property or the one whose wrongful death was caused, so resided." (Emphasis added.)

Section 56 of Title 45 of the United States Code (the Federal Employers Liability Act) provides in pertinent part as follows:

> "Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of

action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the Several States."

STATEMENT OF THE CASE.

Robert McClellan is a citizen and lifetime resident of West Virginia. He was injured in the course of his employment as an employee of the defendant railroad in Kentucky. The defendant is a Virginia Corporation which operates a system of railroads from the east coast to Chicago and St. Louis. Portions of its lines pass through nineteen of Ohio's eighty-eight counties. The executive offices of this railroad, including the offices of the president and the Chairman of the board, are located in Cleveland, Ohio.

Plaintiff-appellant instituted this action at Cleveland, Ohio, in the Court of Common Pleas for Cuyahoga County pursuant to the provisions of the Federal Employers Liability Act. Service was accomplished by delivering a copy of the petition and a summons to the executive offices of the railroad in Cleveland, in conformity with Ohio procedures for service on any corporate defendant. The defendant then filed a motion to quash the summons and the service of summons, relying entirely upon the provisions of Ohio Revised Code § 2307.37. Specifically, defendant's motion to quash the summons asserted:

> "* * * under and pursuant to the provisions of Ohio Revised Code Section 2307.37 this action for personal injuries to the plaintiff cannot be maintained in the Common Pleas Court of Cuyahoga County for the reasons that the plaintiff is a citizen and resident of the State of West Virginia and his alleged cause of action arose and occurred in the State of Kentucky * * *"

In substance, defendant argued that the provisions of the "Ohio Railway Venue Statute" prohibit any action against a railway in Ohio where the plaintiff is not an Ohio resident and the cause of action did not accrue in Ohio.

Ohio statutes have long prohibited application of the doctrine of *forum non conveniens* in actions between persons or corporations who are not citizens or residents of Ohio, even where the cause of action accrued outside of Ohio. See *Mattone v. Argentina*, 123 Ohio St. 393, 175 N. E. 603 (1931); *Perkins v. Benguet Consol. Min. Co.*, 158 Ohio St. 145, 107 N. E. 2d 203 (1952). Since railroads are the only form of transportation described in Ohio Revised Code Section 2307.37 which are still in existence at this time, defendant argued that this special statutory immunity to suit was available to railroads while it was not available to any other corpotate entity or to any other means of transportation or communication.

The trial court granted the motion to quash the summons, relying entirely upon the early Ohio decision in *Loftus v. Pennsylvania R. R.*, 107 Ohio St. 352, 140 N. E. 94, *appeal dismissed by stipulation of the parties*, 266 U. S. 639 (1923). The *Loftus* case held in substance that a nonresident of Ohio could not maintain an action against a railroad in Ohio for injuries sustained outside of Ohio, because of the venue requirements of this same statute. The first syllabus of the Ohio Supreme Court decision in the *Loftus* case (the syllabus of the Ohio Supreme Court is the law of Ohio) states:

> "The amendment to Section 11273, General Code (109 O. L. 81) [now Ohio Rev. Code §2307.37], excludes from the jurisdiction of the state courts of Ohio all causes against the persons and companies therein referred to for injuries to person or property or for wrongful death occurring without the state of Ohio unless such claimant is a resident of this state."

Apparently believing that they were likewise bound by the earlier decision of the Ohio Supreme Court, the Court of Appeals for the Eighth Judicial District of Ohio affirmed that decision of the Common Pleas Court.

The Ohio Supreme Court declined to exercise jurisdiction, and chose to dismiss the appeal and to deny the motion to certify the record for review. At each stage of the proceedings, plaintiff-appellant has challenged the validity of the provisions of the Ohio Railway Venue Statute and insisted that its application in the circumstances of this case violated the provisions of the federal Constitution referred to earlier.

THE CONSTITUTIONAL QUESTIONS PRESENTED ARE SUBSTANTIAL.

A. Privileges and Immunities.

Equal access to the courts of justice is a fundamental and essential part of the Equal Protection Guarantee afforded to citizens of all states. The Ohio Railway Venue Statute, as it has been construed by the Ohio Supreme Court, denies non-citizens of Ohio the same right to use Ohio courts that is available to Ohio citizens. While the statute is drafted in terms of residence, rather than citizenship, it is obvious that the term "residence" is equivalent to citizenship in this context.

Of course, the Fourteenth Amendment to the federal Constitution defines citizenship as residence, where residence is given the traditional meaning of permanent residence or domicile. From the language of the Ohio Railway Venue Statute, it is clear that the legislature was referring to permanent residence, since virtually every other Ohio statute which uses residence as a yardstick for determining venue or jurisdiction has been held to refer to permanent or domiciliary residence. *Hayes v. Kentucky*

Bank, 125 Ohio St. 359, 181 Fed. 542 (1932) (service at "usual place of residence" is service at domicile); *Redrow v. Redrow*, 94 Ohio App. 38, 114 N. E. 2d 293 (1952) ("resident" of state for divorce jurisdiction means domiciliary); Ohio Rev. Code § 2307.38 (venue in action against "nonresident" includes county in which he is "found" within the state). In the *Loftus* case, the Ohio Supreme Court attempted to separate residence from citizenship, but the language of the opinion clearly shows that the court understood "residence" to be permanent rather than temporary. See *Loftus v. Pennsylvania R. R.*, 107 Ohio St. 352, at 363, 140 N. E. 94, at 97:

> "Thus, if a citizen of Pennsylvania is a resident of Ohio, *or if such citizen is sojourning in or traveling through the State of Ohio, and is injured in person or property within the state,* the courts are open to him * * *." (Emphasis added.)

Numerous decisions of this Court have held unequivocally that a state may not bar citizens of sister states from the use of its courts under circumstances where its own citizens may use those tribunals. E.g., *McKnett v. St. Louis & S. F. Ry.*, 292 U. S. 230 (1934); *Miles v. Illinois Central R. R.*, 314 U. S. 698 (1942); *Missouri ex rel. Southern Pac. R. R. v. Mayfield*, 340 U. S. 1 (1950): Ohio cannot foreclose its judicial system to non-citizens in this or any other type of case under the guise of a venue statute.

Indeed, in some circumstances, this statute could prevent an injured litigant from having *any* forum. If, for example, an intrastate Ohio railroad mislabelled a dangerous commodity and that negligence caused damage in another state to which the commodity was carried by a second carrier, the injured party would be unable to enforce his rights in any court.

B. Equal Protection to Claimants Against Railroads.

Even if this statute were not in direct contravention of the Privileges and Immunities Guarantee of the federal Constitution, it is repugnant to the Equal Protection Guarantees. A state may not enact and enforce class legislation which discriminates against some special limited group of litigants without reason or justification. Cf. *Goesaert v. Cleary*, 335 U. S. 464 (1948); *Morey v. Doud*, 354 U. S. 457 (1957); *Chambers v. Baltimore and Ohio R. R.*, 207 U. S. 142 (1907). The Ohio Railway Venue Statute allegedly protects railways under the circumstances involved here, while no provision of the Ohio Code would afford the same immunity to suit to a bus company, an express company, a taxi company, an airline, a trucking company, a telephone company, a telegraph company, or any concern operating any other means of transportation or communication.

We cannot conceive of any justification for limiting the situs of suit against railroads where a similar defense is not granted to any other person or corporate entity even though he be engaged in the identical industry with a different type of instrumentality. There is no doubt whatever that plaintiff-appellant would be entitled to bring his action in this same trial court if he had been injured by a Cleveland-based trucking company, bus company, taxicab company or airline. A court might find that the legislature could reasonably classify businesses engaged in transportation or communication differently from other businesses for venue purposes, on the theory that their instrumentalities are in transit over a wide geographical area. Even that proposition is subject to substantial doubt when it is remembered that virtually every substantial business concern has agents operating motor vehicles in a large geographical region.

However, there can be no justification for singling out claimants against railroads so as to bar their suits under circumstances where claimants against companies engaged in any other form of transportation could bring an action. Indeed, neither defendant-appellee nor any of the courts of Ohio have even attempted to explain a rational basis of classification which would justify discrimination against railway claimants.

C. Equal Protection to Non-residents.

If the Ohio Railway Venue Statute is construed to refer to residents as temporary or transient residents, who would not thereby be citizens, the statute is in contravention of the Equal Protection Clause rather than the Privileges and Immunities Clause. A state may not discriminate against non-residents as a matter of whim or fancy unless there is some reasonable basis for classification to support such discrimination.

In some instances, this Court has upheld a classification in favor of residents and against non-residents, on the basis that a state has a right to afford special protection to its temporary residents whose taxes help to support the government and the courts. *Missouri ex rel. Southern Pac. R. R. v. Mayfield*, 340 U. S. 1 (1950); *Douglas v. New York, N. H. & H. R. R.*, 279 U. S. 377 (1929). However, the Ohio Railway Venue Statute determines rights on the basis of residence at the time the cause of action accrues—not residence at the time the cause of action is enforced in the courts. Thus, the rationale that those who are paying for the courts should have a special right to use them has no meaning here.

The fact that a claimant was a temporary resident at some time prior to his use of the Ohio courts does not imply that any taxes will be received from him during the

pendency of his lawsuit at that later time. Thus, the Ohio legislature has selected the date on which the cause of action arose as the critical date for determining residence, and it thereby effectively discriminates against persons who were resident in Ohio either before or after the date on which the injury occurred. If, for example, the plaintiff had moved to Ohio shortly after sustaining injury outside Ohio, or had moved from Ohio shortly before that incident, he would be barred from the use of Ohio courts, even though his taxes in Ohio were equal to or greater than those of an Ohio resident on the date of his injury.

Manifestly, there is and can be no logical justification for the arbitrary date selected by the legislature. Here again, neither the defendant-appellee nor any of the Ohio courts have made any attempts to justify this blatantly discriminatory legislation.

D. The Supremacy Clause.

Each of the above constitutional objections is given even greater importance when it is remembered that the right involved here is one created by federal statute. We recognize that early decisions of this Court have permitted states to discriminate against non-residents (where "residents" means "temporary residents") in refusing to enforce the provisions of the Federal Employers Liability Act, where such non-residents would be precluded from enforcing all non-federal rights against all other types of defendants in the same circumstances. In view of the language of 45 U. S. C., § 56, which provides that the state courts shall have concurrent jurisdiction with the federal courts in enforcing this act, we submit that further review of that question may be in order.

However, this Court has never authorized the type of rank discrimination presented by the Ohio Railway

Venue Statute which bars the use of Ohio courts to enforce rights under the Federal Employers Liability Act where Ohio does not recognize the doctrine of *forum non conveniens* generally. The fact that only railroads are protected by this special class legislation demonstrates that the federally created rights involved here are in jeopardy.

CONCLUSION.

The constitutional safeguards involved in this matter are of great importance in Ohio and elsewhere. Not only does this legislation attack fundamental guarantees in Ohio, but its pattern could well serve other states as a means to evade their responsibilities to maintain free access to their courts. We submit that this Court should exercise its appellate jurisdiction to settle these constitutional questions.

Respectfully submitted,

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APPENDIX.

COPY OF JOURNAL ENTRY ENTERED BY THE COURT OF APPEALS OF CUYAHOGA COUNTY ON JUNE 1, 1964.

"This cause came on for hearing upon the appeal on questions of law, assignments of error, and the original papers and pleadings from the Court of Common Pleas of Cuyahoga County and was submitted by counsel for the respective parties to the Court of Appeals with oral argument. On consideration whereof, the Court finds that there is no error apparent on the record in these proceedings prejudicial to the appellant.

"IT IS, THEREFORE, considered by the Court that the judgment of the Court of Common Pleas of Cuyahoga County be, and the same hereby is, affirmed and that the appellee, Chesapeake & Ohio Railway Company, recover from the appellant its costs herein expended.

"And the Court, being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

"IT IS FURTHER ORDERED that a special mandate be sent to the Court of Common Pleas of Cuyahoga County, Ohio, for execution upon this judgment."

COPY OF ENTRY ENTERED BY THE CUYAHOGA COUNTY COMMON PLEAS COURT ON JANUARY 22, 1964.

"Motion to quash and to set aside service of summons is granted.

(Decision based on Section 2307.07 O. R. C. as interpreted in *Loftus vs. Pennsylvania R. R. Co.* 1070. S. 352 (1923).)"

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In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. 994.

ROBERT McCLELLAN,
Appellant,

v.

CHESAPEAKE & OHIO RAILWAY COMPANY,
Appellee.

MOTION TO DISMISS.

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In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. 994.

ROBERT McCLELLAN,

Appellant,

v.

CHESAPEAKE & OHIO RAILWAY COMPANY,

Appellee.

MOTION TO DISMISS.

The Appellee moves this Court for its order dismissing the appeal of the Appellant herein on the grounds that the facts in this case do not raise the Constitutional questions argued by the Appellant and in any event such facts do not present any substantial Federal or Constitutional question.

PRELIMINARY STATEMENT.

Ohio Revised Code § 2307.37 has been held to be Constitutional by the Ohio Supreme Court in *Loftus v. Pennsylvania Railroad Company*, 107 Ohio St. 352 (1923).

The Ohio Supreme Court has denied Appellant's motion to certify the record of this case from the Ohio Court of Appeals (8th Appellate District) which had theretofore affirmed the judgment of the Court of Common Pleas for Cuyahoga County dismissing Appellant's petition on authority of Ohio Revised Code § 2307.37 and *Loftus v. Penna. R. Co., supra.*

This appeal should be dismissed for the following reasons:

1. Upon the authority of *Loftus v. Penna. R. Co.*, *supra*.

2. The arguments advanced by the Appellant relating to the failure of the Ohio Supreme Court to distinguish between "residence" and "citizenship" are hypothetical in nature and not supported by authority.

3. The record in this case does not disclose that the Appellant has been deprived of any substantial Constitutional rights.

Emphasis added throughout by boldface type.

PRIVILEGES AND IMMUNITIES.

A.

The thrust of the Appellant's appeal is based upon the contention that Ohio Revised Code § 2307.37 is unconstitutional in that it is construed by the Supreme Court of Ohio to deny non-citizens of Ohio the same rights to use Ohio courts that are available to citizens of Ohio.

This contention is based upon the hypothesis that the statute is drafted in terms of residence and "it is obvious that the term 'residence' is an equivalent to 'citizenship' " from the context of the statute.

Inasmuch as the hypothesis upon which the Appellant bases his contention was expressly disposed of in *Loftus*, it should be sufficient rebuttal to the Appellant's entire argument to point out that portion of the opinion where the court stated at page 363:

> "* * * **The statute is based upon residence without regard to citizenship.** That residence and citizen-

> ship are not synonymous, and that discrimination on the basis of residence, within reasonable limits, is not a discrimination against citizenship, within the meaning of the constitutional mandate, is established by many authorities, * * *."

That the portion of the Court's opinion in *Loftus* quoted by the Appellant (St. of Jur. p. 7) rather than disclosing that the Ohio court confounded the distinction between residence and citizenship; clearly points out the distinction that was made by the Court.

In an attempt to overcome this distinction the Appellant contends that the 14th Amendment "defines citizenship as residence." However, the obliteration of any distinction between residence and citizenship is not only not justified by the provisions of the 14th Amendment, such a construction is not warranted by the pronouncements of this Court. *Missouri, ex rel. Southern Ry. Co. v. Mayfield*, 340 U. S. 1 (1950); *Slaughter-House* cases, 83 U. S. 36 (1873).

The operation of Ohio Revised Code § 2307.37 advanced by Appellant to prove his hypothesis is completely without merit. If, for example, mislabeling a dangerous commodity by any railroad in the State of Ohio is negligence and that negligence causes injury or damage to anyone outside the State of Ohio, the injured person may prosecute his action against the offending railroad within the State of Ohio. The statute specifically so provides.

The Appellant has not been deprived of any right of access to the Ohio courts that would be available to an Ohio citizen under the same or similar facts giving rise to the cause of action sought to be maintained. The appeal on this ground ought to be dismissed.

EQUAL PROTECTION.

B.

It is the Appellee's conception of the equal protection clause of the 14th Amendment that nothing therein is intended to deprive the states of their legislative power to establish and regulate judicial proceedings. Revised Code § 2307.37 which is characterized throughout the Appellant's Jurisdictional Statement as the "Ohio Railway Venue Statute," does not apply to railroads alone nor does it constitute class legislation.

The assertion that railroads are the **only** transportation organizations to which Ohio Revised Code § 2307.37 can **now** apply is a gratuitous generalization on behalf of the Appellant which is not warranted by the record or the facts which would be available to the Appellant upon a trial of this case. That evidence that other transportation systems are affected is readily available, but not a part of this record, was recognized by both Appellate courts of Ohio during the oral arguments of this matter.

The question as to whether or not citizens of Ohio are afforded rights of access to Ohio courts which are not afforded to the Appellant is the question which the Appellant is attempting to place before this Court. Whether or not the classification set forth in Ohio Revised Code § 2307.37 may constitute class legislation in derogation of the rights of some other types of transportation facilities is not a justiciable issue in this appeal.

C.

The hypothesis that the Appellant might have a claim which might be brought in an Ohio court certainly raises no issue as to the violation of any of the Appellant's rights in this action.

That the Legislature may prefer residence as a prerequisite to access to Ohio courts so long as citizens of the State of Ohio and other states are treated equally violates no right afforded to the Appellant under the 14th Amendment. Such a condition precedent was recognized in *Missouri ex rel. Southern Ry. Co. v. Mayfield*, 340 U. S. 1 (1950), cited by the Appellant in support of his position. *Loftus v. Penna. R. Co., supra.*

The Appellant, a life-long citizen and resident of the State of West Virginia, whose cause of action arose in the State of Kentucky, has been afforded every right available to a citizen of the State of Ohio injured outside the state while a non-resident of the State of Ohio. *Loftus v. Penna. R. Co., supra.*

The attempt to place Ohio Revised Code § 2307.37 in that category of that legislation known as "class legislation" by the example advanced (St. of Jur. pp. 9, 10) by the Appellant does not warrant comment. The selection of a date by Appellant contrary to that of the statute does not sustain any argument that the date set forth in the statute is "arbitrary." However, even if such a proposition were true, it could not support the Appellant who it is admitted "is a citizen and lifetime resident of West Virginia."

The appeal on this ground ought to be dismissed.

SUPREMACY CLAUSE.

The supremacy of the Federal statute, upon which the Appellant bases his cause of action against the Appellee, over the procedural statutes of the State of Ohio is argued before this Court for the first time in this action.

The argument of the Appellant cannot be taken seriously in view of this Court's pronouncements in *Miles v. Illinois Central R. Co.*, 315 U. S. 698 (1942) at page

702; *Missouri, ex rel. Southern Ry. Co. v. Mayfield*, 340 U. S. 1 (1950); *Loftus v. Penna. R. Co.*, 107 Ohio St. 352 (1923).

The request that this Court review the discrimination alleged to exist in the Ohio courts against the enforcement of causes of action arising under the Federal Employers' Liability Act is ridiculous. Appellant's attention to *Gallick v. Baltimore and Ohio R. Co.*, 372 U. S. 108 (1963) and *Harris v. Pennsylvania R. Co.*, 361 U. S. 15 (1959) should cause a withdrawal of this contention.

The rights of railroad workers and their causes of action arising under 45 U. S. C. § 56 are not in jeopardy in the State of Ohio, and the Appellant's appeal on this ground ought to be dismissed.

CONCLUSION.

There is no new question of law, Constitutional or otherwise, presented to this Court through this appeal, nor are any of the issues which the Appellant has attempted to raise of great public interest in Ohio. The legal issues involved in this appeal have been disposed of by the Ohio courts agreeably to those Constitutional principles which have been enunciated by this Court.

However, there is a principle involved herein that ought to require the dismissal of this appeal—viz. consistency in advocacy for justice.

It is contended by Appellant's counsel that Appellant ought to have the right to prosecute his action in the Common Pleas Court of Cuyahoga County, Ohio, against the provisions of Ohio Revised Code § 2307.37 despite the fact that the Courts of Kentucky and West Virginia are open to him. It is argued that the Appellant must have equal access to the Common Pleas Court of Cuyahoga County

with the residents of Cuyahoga County as his Constitutional right.

In *Buchanan, et al. v. James A. Rhodes, Kingsley A. Taft* (Case No. C65-159 U. S. D. C. Ohio Eastern Division, now pending) counsel for the Appellant herein has filed a complaint for, and on behalf of, 14 of his clients who have pending cases in the Common Pleas Court of Cuyahoga County, Ohio. All of these 14 plaintiffs are residents of Cuyahoga County, Ohio.

The gravamen of the aforesaid *Buchanan* case is that the 14 individual plaintiffs who have pending cases are being deprived of their right to obtain a speedy trial because of the disproportionate number of judges allowed by law to Cuyahoga County as compared to other counties in the State of Ohio. The allegations state that as of December 31, 1964, 17,350 cases were pending in Cuyahoga County Common Pleas Court, with an average delay for each case of four years from the time of filing to the date of trial.

The suit seeks a mandatory injunction from the Federal District Court sitting at Cleveland, directed to the Legislature of the State of Ohio as well as the Chief Justice of the Ohio Supreme Court requiring the establishment of a plan for the reapportionment of Ohio Common Pleas Judges to provide residents of Cuyahoga County equal protection of the laws and "so as to prevent the continued deprivation of the property rights without due process of law of the plaintiffs" and other residents of Cuyahoga County who have pending cases in the Common Pleas Court of that county.

Finally, the complaint concludes by praying for such "legal and equitable relief" as the Court shall deem just and appropriate.

It appears just and appropriate, that if the allega-

tions of counsel in the complaint in the *Buchanan* case warrant the equitable relief sought for the residents of Cuyahoga County, the contentions of this appeal cannot be justified.

If justice is the "constant and perpetual disposition to render to every man his due" the allowance of this appeal would further deny the residents of Cuyahoga County the Constitutional rights which counsel for the Appellant contends for in the *Buchanan* case. *Loftus v. Penna. R. Co., supra.*

Therefore, the Appellee respectfully moves this Court to dismiss this appeal.

Respectfully submitted,

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In the Supreme Court of the United States

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ROBERT McCLELLAN,
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Defendant-Appellee.

APPEAL FROM THE COURT OF APPEALS FOR THE EIGHTH JUDICIAL DISTRICT OF OHIO, CUYAHOGA COUNTY.

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL.

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In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. 994.

ROBERT McCLELLAN,
Plaintiff-Appellant,

v.

CHESAPEAKE & OHIO RAILWAY COMPANY,
Defendant-Appellee.

APPEAL FROM THE COURT OF APPEALS FOR THE EIGHTH JUDICIAL DISTRICT OF OHIO, CUYAHOGA COUNTY.

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL.

This Memorandum Brief is submitted to respond to certain allegations made in appellee's Motion to Dismiss and to bring to the Court's attention two judicial matters which arose subsequent to filing of the original Jurisdictional Statement in this case.

APPELLEE'S MOTION TO DISMISS.

Appellee relies principally upon the decision of the Ohio Supreme Court in *Loftus v. Pennsylvania R. R.*, 107 Ohio St. 352, 140 N. E. 94 (1923). We submit that the decision was erroneous at the time that it was made more than forty years ago, since the authorities relied upon by the Ohio Supreme Court in fact require the opposite conclusion. See, e.g., *Missouri Pac. R. R. v. Clarendon Boat Oar Co.*, 257 U. S. 533 (1922); *Chambers v. B. & O. R. R.*, 207 U. S. 142 (1907), as modified by *Hughes v. Fetter*, 341 U. S. 609 (1951). It is appropriate to note that the appeal in

the *Loftus* case to this Court was dismissed by stipulation of both parties, presumably as a result of a settlement. See *Loftus v. Pennsylvania R. R.*, 266 U. S. 639 (1923). Further, subsequent decisions of this Court have emphasized the error of the Ohio court in the *Loftus* case.

PRIVILEGES AND IMMUNITIES AND EQUAL PROTECTION.

The decision in *Missouri, ex rel. Southern Ry. v. Mayfield*, 340 U. S. 1 (1950) establishes that a state may apply the doctrine of *forum non conveniens* to bar a FELA action only if it applies "the doctrine for all causes of action begun in its courts." See *Id.* at 3. Ohio expressly rejects the doctrine of *forum non conveniens* as to all causes of action except those against railroads for injury to person or property. The refusal of Ohio courts to hear such a limited class of cases violates the Privileges and Immunities and Equal Protection clauses of the Fourteenth Amendment. *Miles v. Illinois Central R. R.*, 315 U. S. 698 (1942); *McKnett v. St. Louis & S. F. Ry.*, 292 U. S. 230 (1934). Defendant-appellee argues that this plaintiff would have a forum in some other state. However, the apparent congressional purpose has been found by this Court to include a choice of forum for the injured workman. See *Miles v. Illinois Central R. R., supra*, at pp. 706-708 (Mr. Justice Jackson concurring).

With respect to the special preferential treatment given to railroads, in violation of the Equal Protection Guarantee, appellee asserts that railroads are not the only transportation companies to which Ohio Revised Code Section 2307.37 now applies. Counsel for appellant is not aware of any stage coaches or any of the other forms of transportation specified in that statute which still operate in Ohio. Appellee does not now and has never suggested

any such form of transportation to which the statute applies, other than railroads. Contrary to the assertion by appellee in its Motion, no Ohio appellate court identified any such form of transportation (other than railroads) which are governed by this statute, during the course of oral argument, in any opinion, or otherwise. We must repeat that this section constitutes class legislation since it affords peculiar protection to railroads that is unquestionably not available to buses, trucks, taxis, ships, barges, or airplanes, let alone to corporations generally. This plaintiff is therefore being discriminatorily barred by a statute that attacks only claimants against railroads who were nonresidents of Ohio on a selected arbitrary date.

SUPREMACY CLAUSE.

Contrary to appellee's assertion, on page 5 of its motion, considerable emphasis was placed by appellant in all the courts below on the fact that the court was dealing with a federally created right. It is interesting that appellee should cite as authority for Ohio's special deference to FELA claimants, the decisions in *Gallick v. Baltimore & Ohio R. R.*, 372 U. S. 108 (1963), and *Harris v. Pennsylvania R. R.*, 361 U. S. 15 (1959). While this appeal concerns Ohio's refusal to hear a whole class of FELA cases (nonresidents injured outside of Ohio), the two cited cases are hardly authority for Ohio's favorable treatment of FELA claimants generally. The Court will remember that in each of those cited cases the Ohio courts denied any right of recovery, and this Court reversed those rulings to afford a remedy to the injured workmen. The Ohio Railway Venue Statute is a direct challenge to the supremacy of federal law by Ohio's refusal to entertain a large group of such actions under this federally established cause of action.

NEW JUDICIAL DEVELOPMENTS.

Subsequent to the filing of appellant's Jurisdictional Statement, this Court decided the case of *Burnett v. New York Central R. R.*, 33 L. W. 4298 (October Term, No. 437, decided April 5, 1965). In that case this Court was concerned with the Ohio Railway Venue Statute and its effect on the limitations period established by the Federal Employers Liability Act. Because of the legal circumstances in which that case arose, this Court was not there called upon to decide the constitutionality of the Ohio statute. Footnote 1 to the Opinion reads as follows (33 L. W. 4298):

> "Counsel for petitioner stated at oral argument that the constitutionality of this special venue provision for actions against railroads was being challenged in other litigation. No constitutional issue was raised in these proceedings, and we express no views upon any such question."

The "other litigation" referred to in that oral argument is the present case. This Court has expressly reserved determination of the constitutionality of the statute, and we submit that review at this time is appropriate.

Second, counsel for appellee refers to the recently filed action of *Buchanan, et al. v. Rhodes, et al.* (N. D., Ohio, C65-159) which was commenced after the Jurisdictional Statement was filed in the present case. In the *Buchanan* case, counsel for the present appellant has sought a judicial reapportionment in Ohio, similar to the legislative reapportionment that this Court ordered for Ohio and other states. The appellee railroad cites the *Buchanan* case as a demonstration that the Common Pleas Court for Cuyahoga County is already overworked. The gravamen of the complaint in the *Buchanan* case is that there should be a reapportionment of judges among the

Ohio counties since Cuyahoga County (Cleveland, Ohio) has roughly one-seventh the number of judges per unit of population as certain rural counties. The argument of appellee in this case is that *no* Ohio county should entertain the present lawsuit, so that appellee can draw small solace from an attempt to equalize the judicial representation in Ohio counties.

While the *Buchanan* case may in due course come before this Court, its legal effect on the present proceedings is at best premature. Further, counsel for the appellant in this case, who is also counsel for the plaintiff in the *Buchanan* case, finds no inconsistency in attempting to cure two separate evils: Ohio's refusal to entertain this broad class of FELA actions in violation of federal constitutional rights, and Ohio's failure to provide equal protection and due process for its own residents. In any event, we are constrained to remind appellee that two wrongs do not make a right.

CONCLUSION.

For the reasons stated in the original Jurisdictional Statement and amplified above, appellant respectfully asks this Court to overrule the Motion to Dismiss the Appeal and to note probable jurisdiction in this case.

Respectfully submitted,

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